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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 616, 617 and 618

ALLEGHANY CORPORATION, *et al.*,
Appellants,
v.
BRESWICK & CO., *et al.*,
Appellees.

JOSEPH S. GRUSS, *et al.*,
Appellants,
v.
BRESWICK & CO., *et al.*,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
BRESWICK & CO., *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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December, 1957.

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, BRESWICK & Co., RANDOLPH PHILLIPS, and MYRON NEISLOSS, appellees herein, move that the final judgment of the District Court be affirmed on the ground that its decision is correct and that the questions presented as grounds for these appeals are so unsubstantial as not to need further argument.

Questions Presented

Division 4 of the ICC ruled that Alleghany Corporation had acquired control of the New York Central Railroad System of 73 carriers in violation of § 5(2) of the Interstate Commerce Act. This finding was affirmed by the District Court which agreed that it was an "unchallenged prior consistent administrative interpretation" of the Statute. Under § 20a(2) the ICC may authorize issuance of new securities "*only if* * * * for some lawful object * * * and compatible with the public interest * * * and * * * reasonably necessary and appropriate for such purpose."

The questions presented are:

1. Was the District Court correct in affirming Division 4's finding that § 5(2) had been violated, and in ruling that the standards of § 20a(2) prohibited issuance of New Preferred and New Common Stocks based on the unlawfully-acquired assets? In enacting § 20a(2) did Congress permit the exposure of innocent future investors to the risks inherent in such unlawful assets?

2. Last term this Court ruled "We need not decide * * * and intimate no opinion" whether Alleghany Corporation violated § 5(2) of the Interstate Commerce Act, as such a decision was not necessary to affirmance of the ICC order dated May 24, 1955, which assumed jurisdiction over Alleghany pursuant to § 5(3). This Court then remanded to the District Court for decision the question as to whether another ICC order dated June 22, 1955, made in a different proceeding, approving issuance of securities under § 20a, violated the Act. Are appellants correct in stating that the District Court was required, as a result of this Court's prior decision, to exclude from its duties under the remand the determination of the § 5(2) question insofar as it was relevant to the issue under § 20a?

Statement

Appellants have concerted on a strategy of misstating the case by confusing two entirely separate issues. The question now presented was carefully left undecided by this Court last Term, and was expressly submitted to the District Court for its consideration on remand.[1]

This is an action brought by common stockholders of appellant Alleghany Corporation, a holding company controlling the New York Central Railroad System. Appellees sought to set aside two orders of the Interstate Commerce Commission believed to be injurious to the holders of common stock.

The first order dated May 24, 1955 (R. 506, 516)[2] assumed jurisdiction over Alleghany, pursuant to § 5(3) of the Interstate Commerce Act.[3] The second dated June 22, 1955 (R. 554) approved the issuance by Alleghany of new convertible preferred stock, pursuant to § 20a.[4]

Thus, this case initially raised two questions: Did the ICC have jurisdiction under § 5(3) and was its subsequent exercise of jurisdiction under § 20a proper? When the case was here last Term, this Court answered the *first* question in the affirmative, upholding the *first* order. It did not consider or pass on the second question or order. Instead, it remanded the cause for consideration of the second question —whether 'the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act'' (353 U. S. 151, 175).

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[1] *Alleghany Corporation, et al.* v. *Breswick & Co., et al.*, 353 U. S. 151.

[2] Record references are to the printed record in Numbers 36 and 114, October Term, 1956.

[3] *Louisville & J. B. & R. Co. Merger*, 290 ICC 725; 295 ICC 11.

[4] R. 518-537.

Acting in precise compliance with this Court's mandate, the District Court proceeded to consider whether the Commission had exercised its jurisdiction properly when it approved Alleghany's preferred stock issue. It agreed with Division 4 of the ICC that Alleghany had acquired and maintained control of the New York Central system of 73 affiliated carriers in violation of § 5(2) of the Act, and it held pursuant to a continued and unbroken series of ICC precedents, which are unchallenged by appellants, that a § 5(2) violator could not lawfully issue securities under § 20a based on some $14,700,000 of these illegal assets, or obtain any other relief or benefits under the Act. The single exception to this doctrine was carved out by this Court in a 5 to 3 decision last Term, when it held that a § 5(3) order imposing ICC jurisdiction over Alleghany was proper even if a § 5(2) violation existed, since otherwise there would be the "quixotic" result of the agency losing jurisdiction over the violator.[5]

Acting squarely within the above legal principles and the terms of the remand, the District Court then held the stockholder invalid under § 20a.[6] In addition, the District Court left the door open to Alleghany to regularize its position by filing a § 5(2) application for control of the

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[5] The Court said (353 U. S. at 161):

> "We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control'. There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic."

[6] The opinion of the District Court is not yet reported but is set forth in Appendix A to the ICC Jurisdictional Statement. The final judgment of the District Court appears at Appendix B of the same statement.

New York Central system.[7] Hence the second question presented by this controversy, which this Court did not pass on last Term, is now here.

The fourth clause of § 5(2)(a)(i) of the Interstate Commerce Act requires the ICC to authorize the acquisition by a non-carrier (Alleghany) of two or more carriers, whether or not said carriers are part of a single established system (see ICC Jurisdictional Statement, App. D, p. 79). When this case was here last Term, this Court held that as a result of the 1954 proxy contest, Alleghany had acquired *de facto* control of New York Central Railroad Company, a carrier, and also of the Louisville & Jeffersonville Bridge Company, a second carrier in the Central system, as a result of a merger application under § 5(2) approved in 1955, and that therefor the ICC had jurisdiction over Alleghany pursuant to § 5(3) of the Act. This Court held that the ICC possessed *jurisdiction* even though it had never approved the acquisition of control of New York Central, because any other holding would reach the "quixotic" result that "the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction" (353 U. S. 151, 162).

Whether the Commission properly exercised jurisdiction when it approved the preferred stock issue is obviously another matter. Section 20a of the Interstate Commerce

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[7] The District Court said:

> "In the absence of compelling reasons to the contrary, as to which no findings were made, authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary." (ICC Jurisdictional Statement, at pages 38-39).

Act forbids the issuance of securities by those under Commission jurisdiction without its approval. It empowers the Commission to grant approval "*only if* • • • for some lawful object • • • compatible with the public interest • • • and • • • reasonably necessary and appropriate for such purpose" [49 U. S. C. 20a(2)].

The ICC has repeatedly held that when a proposed new security is to be based on assets acquired in violation of § 5(2), it cannot "justify the findings required by § 20a of the Act as to the objects and purposes involved in the issue" (See pp. 16-18, *infra*). Alleghany's proposed New Convertible Preferred Stock and its proposed New Common Stock to be issued on conversion of the Preferred were admittedly to be based on $14,700,000 (now $27,000,000) of illegally-acquired Central controlling stock. Thus to the extent that the two new stocks capitalize the illegal assets, their issuance is not "for some lawful object"; insofar as the two new stocks expose future public investors to the risks inherent in the illegal assets, their issuance is obviously not "compatible with the public interest"; and in view of the fact that the huge funds ($27,000,000) diverted to purchase the illegally acquired assets would more than pay off the $18,000,000 of dividend arrearages on the old stock whose accrual and alleged unpayability are the only grounds for the new stocks' issuance (R. 528-530), their issuance could not be "reasonably necessary and appropriate" in the circumstances.

All appellants concede, as the District Court found, that Alleghany's Central investment is "subject to injunction, divestiture and other sanctions" under § 5(4), (7), (8), and (9). But they condition the concession upon the correctness of the finding by Division 4 and the District Court of a § 5(2) violation. Accordingly, their entire case is based on a denial of that violation despite its incontestable nature. Realizing this, they seek to widen the scope of last Term's decision by asserting the District Court's disobedience to an implied mandate never given. The District Court found no substance to such a notion.

In addition the District Court expressly left the door open to a regularization by Alleghany of its position, if it would merely file an application under § 5(2) to control the New York Central system, and to obtain the statutory finding that Alleghany's control and the methods by which it obtained it were "in the public interest". In 1954, large institutional investors in Central securities, such as the Metropolitan Life Insurance Company, the John Hancock Insurance Company, as well as Harold S. Vanderbilt and other directors on the old Central board, had contended that such acquisition was not "in the public interest" but, like appellees they were subsequently denied any hearing on this issue by virtue of an ICC decision overruling Division 4's finding that § 5(2) had been violated.

It is obvious that different findings of fact and conclusions of law are required under § 5(3) than are required under § 20a. Yet by making it seem that the legal effect of the § 5(2) violation would be held by this Court to be the same with respect to both sections of the statute, appellants are hoping to shut off any consideration of the merits of the District Court decision. That the same factor should have two entirely different legal consequences is explained more fully under point I of this motion, sub section (C).

Other attempts to confuse this Court by contending that appellees did not properly raise before the ICC the issue upon which the District Court decided in favor of appellees, are made clear by reference to Appendix A to this motion, in which a chronology of the pleadings and of the ICC rulings is outlined. In Appendix B for the information of this Court appellees also deal with the events and legal issues arising after the close of the ICC record, that record providing the sole basis for review at the present time.

As we shall show, the findings of the District Court are unassailable and require affirmance of the judgment below.

ARGUMENT

I

The District Court correctly ruled that Congress under the standards of § 20a(2) prohibited the exposure of the public to the risks inherent in securities based on unlawfully acquired assets.

The decision of the District Court is based on two rulings: (A) that Division 4 correctly ruled that the acquisition of control of the 73 carriers in the New York Central System violated § 5(2);[8] and (B) that § 20a(2) prohibits the issuance of securities based on assets acquired in violation of § 5(2). We shall attempt to show that the District Court's decision is so clearly correct that no oral argument is required and that the judgment should be affirmed.

Exposition of these points will make it clear we believe, as set forth in (C) hereafter, that there is no basis for appellants' contention that the District Court was disobedient to the mandate of this Court.

A. CONGRESS SPECIFICALLY AMENDED THE INTERSTATE COMMERCE ACT TO PREVENT AN UNAUTHORIZED ACQUISITION OF CONTROL OF A SINGLE SYSTEM OF "TWO OR MORE CARRIERS."

There is overwhelming and uncontroverted support for the District Court's holding that the statute requires a control application whether or not the "two or more carriers" acquired are part of a single established system:

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[8] This point was fully briefed and argued before the Court last term, but was expressly left undecided in its opinion as not necessary to decision (353 U. S. 151, 161-162). See Briefs in Nos. 36 and 114, October Term, 1956. Brief for Appellees, pp. 66-79; ICC brief, pp. 47-63; Alleghany Brief, pp. 77-84, and Reply Brief, pp. 9-18.

(1) The explicit language of the fourth clause of § 5(2)(a)(i) which specifies "two or more carriers", not "two or more systems";[9]

(2) Senate Report No. 180, 75th Cong. 1st Sess. (1937) and its explicit reference to this system argument "loophole" and to the 1933 Act's "ambiguity" in this respect;[10]

(3) The addition by Congress of the words "or otherwise" to the fourth clause in the 1940 amendment, and its simultaneous broadening of the scope of § 5(4);[11]

(4) The Report of the ICC Examiner in the 1945 Alleghany case holding as contended here with respect to an unauthorized acquisition of control of The Chesapeake System (consisting of The Chesapeake & Ohio; New York, Chicago & St. Louis; and Pere Marquette Railroads);[12]

(5) Alleghany's acquiescence in that report by its request for approval of acquisition of control of the Chesapeake System in the 1945 case;[13]

(6) The 1945 order specifically approving and authorizing Alleghany's acquisition of control of the above "carriers" in the Chesapeake System (R. 184);

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[9] The relevant text of the statute is set forth in ICC Jurisdictional Statement, p. 79. See fourth clause, which makes it unlawful without ICC authorization "for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;" and fifth clause which similarly prohibits a non-carrier "which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

[10] See Brief for Appellees, *Alleghany Corp.* v. *Breswick & Co.*, No. 36, October Term, 1956 at pp. 66-69.

[11] Op. cit., pp. 69-71.

[12] Op. cit., pp. 73-76.

[13] Op. cit., p. 75, fn. 19. Alleghany's Reply Brief objected to the characterization of its action in the 1945 case as "an application" for authority to acquire control. But the ICC, without objection, so treated it. Id., fn. 19.

(7) Division 4's finding in the 1955 jurisdictional case that in the *Chesapeake* case (261 ICC 239)

> "among other things, Alleghany was authorized, through ownership of stock, to acquire control of the Chesapeake & Ohio Railway Company, herein called Chesapeake; the New York, Chicago & St. Louis Railroad Company, and the Pere Marquette Railway Company, and their respective subsidiaries and affiliates, herein together referred to as the Chesapeake system" (R. 418).
>
> "Alleghany will continue to be considered as a carrier subject to the Act through the vehicle of the Central System in lieu of through the Chesapeake System" (R. 441);
>
> "However, unlike the request in the *Chesapeake* case, the authority now requested involves only our approval of the proposed change in the manner of control of the properties and franchises of Jeffersonville. • • • The application in the *Chesapeake* case differed • • • also in that Alleghany at that time requested our authorization to control Chesapeake and its related *carriers*" (R. 427);

(8) Central's and ICC's consistent administrative practice under § 20a(12) in seeking and granting approval to interlocking directors between the "carriers" in the Central System;[14]

(9) Division 4's own ruling and case citations in the 1955 jurisdictional case showing Alleghany's "inconsistency" and the unchallenged prior administrative interpretation (R. 425);

(10) The fact that Congress did not, according to this Court's decision last Term (353 U. S. 151), exempt a non-carrier person's acquisition of a second carrier in the same system from a control application under the fifth clause of § 5(2)(a)(i), the very next clause after the one now at issue.

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[14] Op. cit., pp. 76-77.

(11) This Court's ruling last Term in the present case that intra-mural shifts in control, even though "small, even minimal" in effect must be authorized by ICC order (353 U. S. at 170).

None of these propositions is even adverted to or rebutted by appellants. The full I. C. C.'s disregard of them in its report on reconsideration, as in its statements here, is supported by reference to no authority, be it statutory, legislative, administrative or judicial.

The findings of Division 4 showing Alleghany's "inconsistency" and statutory violation.

These findings appear at R. 425-426:

> "The Central System includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. (*Citing Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co., and Montgomery*, 56 M. C. C. 127, 131; *Stonghton-Control-Delaware Coach* Co., 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.*, 37 M. C. C. 91.) That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on that point, some discussion thereof is necessary" (R. 425).
>
> "In what appears to be an inconsistency, Alleghany's counsel also argued that because Alleghany (a noncarrier railroad holding company), has control of a major railroad system, it should continue to be considered as a carrier subject to our jurisdiction.

That conclusion could be justified under the Act, only on the grounds that Alleghany controls more than one carrier subject to the Act.

"Among other arguments, Alleghany's suggestion that a decision contrary to its views would result in requiring approval by us whenever a board of directors of a carrier corporation is replaced by the stockholders' election, also is untenable. To reason thus ignores the distinction between election of individuals as directors and control of the board of directors. The latter situation seems to have arisen when Alleghany, through the ownership of stock and the naming of a board of directors of its own choosing or otherwise, assured itself of control of the board of directors of Central and its related carriers. As a consequence, a holding company and those in control thereof, admittedly acquired control of a carrier which controls subsidiary carriers. In our opinion the Congress sought to prohibit that type of acquisition of control, unless approved and authorized by us upon consideration of an application, and upon our finding that the proposal would be consistent with the public interest" (R. 426).

The Reasons given by the Full ICC for Overruling Division 4 Conflict with the subsequent Findings of this Court.

Upon reconsideration in the jurisdictional proceeding, the full ICC overrruled Division 4 by finding:

"Central was formed in 1914 by the consolidation of 11 carrier companies. It is the parent company of the New York Central Railroad System, comprised of numerous carriers including several railroad systems and the railroads and properties controlled and operated by those companies under lease or otherwise. The present system was recognized by us as an integrated unit in *New York Central Unification*, 150 I. C. C. 278, decided January 14, 1929, and upon the internal rearrangement of Central's corporate structure pursuant to our decision in Finance Docket No. 17700, *New York Central R. Co. Merger*, 282 I. C. C. 813 (not printed in full), decided June 18, 1952. As outlined in detail in the foregoing reports and in the

record herein, the same executives serve Central and the subsidiary companies and the carriers of the system have interlocking directorates.[15] When Allegheny, by stock ownership and by the favorable action of the stockholders acquired control of Central, all the properties within the carrier's orbit were under long established single operating control" (R. 511-512).

"As Central, at the time of such acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of section 5(2) of the Act and that our approval was not necessary" (R. 513-514).

In overruling the above finding the District Court held:

"Its language [§ 5(2)(a)] does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. • • • We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system (353 U. S. at p. 170).

"In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block

[15] We interpolate here that the ICC omitted to note that these interlockings were pursuant to special applications and orders under § 20a(12), which speaks as does § 5(2) of "carriers", not systems. See Brief for Appellees, No. 36, Oct. Term, 1956, at pp. 76-77.

> of corporate stock by a single person, or a small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.-Purchase*, 271 I. C. C. 513 (1948)". (ICC Jurisdictional Statement, pp. 34-35, and fn. 6a.)

Alleghany's argument that § 5(2) has been violated by numerous other controlling persons if it applies to acquisition of control of a system, is without any legal force. In none of its examples (Alleghany Jurisdictional Statement, pp. 17-18) did a holding company acquire control and interlock its officers and directors. As above shown, this was the specific type of acquisition at which the 1940 amendment to the Act was directed, after a Senate report identifying Alleghany as the beneficiary of the previous "loophole." And the ICC's subsequent administrative practice with respect to Alleghany in the 1945 proceedings confirmed that this type of control was the objective of the amendment. Nor even if the examples were apposite, would the fact that others have violated the Act excuse Alleghany's violation.[16]

This Court, in its decision last Term, specifically rejected appellees' argument and the District Court's finding that where "the merger still leaves the non-carrier in indirect control of such property, no acquisition (of control) by the non-carrier results from the merger • • •". 138 F. Supp. at 127-128, as cited at 353 U. S. 165-166. Mr. Justice Frankfurter, for the majority, explicitly held:

> "We think that this is too narrow a reading of the statute. Not labels but the nature of the changed

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[16] An answer to the fears of the ICC and Alleghany over the fate of future proxy contestants is set forth in Brief for Appellees, No. 36, October Term, 1956, at pp. 78-79.

relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under § 5(2)" (353 U. S. at 166).

"The crux of each inquiry to determine whether there has been an 'acquisition of control' is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease?" (353 U. S. at 169).

Alleghany now has a direct 17% stock investment in Central and interlocking directors owning additional Central stock, which this Court held constituted a *de facto* 'acquisition of control' (353 U. S. at 165). None of these relationships existed in 1929 or 1952 when, in the ICC's words, "The present system was recognized by us as an integrated unit." Alleghany, of course, was not even a party to those earlier control cases. Yet it is obvious that its $14,700,000 stock investment (now $27,000,000) indicates a "changed relation" and "a significant increase in power" over Central much greater than the "small, even minimal" effect of the Jeffersonville Bridge Company merger with the Big Four, a merger with a company *already* owning and controlling 100% of the Bridge Company. If that "minimal" change in relationship, to quote this Court, represented an "acquisition of control" by Alleghany of the Bridge Company that required statutory authorization under § 5(2), by what logic may it be argued that a massive new investment of $14,700,000 by the same new controlling person represents no "changed relation" and no "significant increase in power?" The ICC's only answer is that when it authorized somebody else other than Alleghany, namely the New York Central Railroad Company (a separate carrier), to acquire control of the other 72 carrier companies it thereby perpetually immunized all other acquisi-

tions of control by other persons of the same 73 companies from the requirements of the Act.

The District Court, faced with this very "inconsistency" that Division 4 had earlier recognized stated that the "language [of § 5(2)] does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized". (ICC Jurisdictional Statement, p. 34)

B. THE DISTRICT COURT CORRECTLY RULED THAT THE STANDARDS OF § 20a PROHIBIT THE ISSUANCE OF SECURITIES BASED ON UNLAWFULLY-ACQUIRED ASSETS.

In this section we will show (1) that long-established, consistent and continuous administrative precedents of the ICC bar § 20a issuance of securities based on assets acquired in violation of § 5(2); (2) that the ICC has similarly barred relief to violators of § 5(2) under sections other than § 20a; and (3) that the District Court was correct in following these precedents.

It has been the consistent administrative practice of the ICC to deny a carrier the right under § 20a to issue new securities based on any asset unlawfully acquired.

In *Bonds of St. Louis-San Francisco Railway Co.*, 150 ICC 139 (1928), the carrier applied for authority under § 20a to issue $8,000,000 of consolidated mortgage gold bonds. The ICC denied the application as to $5,000,000 of the proposed issue that would have been based on stocks acquired without its approval, stating:

> "The applicant has acquired the 183,333 shares of Rock Island common stock without our authority, presumably as a step toward acquiring control of that company. If carriers use their resources and credit to acquire the stocks of other carriers without first obtaining such authority, they do so with the knowledge that it may not be granted, and that until

it is granted and the conditions above indicated fulfilled, that their investment in those securities cannot be used as a basis for capitalization." (pp. 140-141)

In *Bonds of Chesapeake & Ohio Ry. Co.*, 150 ICC 257 (1929), the carrier applied under § 20a for authority to issue bonds to reimburse its treasury for, among other expenditures, the purchase of all the capital stock of three smaller carriers. It was held that since there was no authority to secure control that the acquisition could not be the basis of the issuance of the bonds. The ICC stated:

"In *Securities of Louisville & Nashville R. R.*, 76 ICC 718, 723, we said:

'We are of the opinion that ordinarily a carrier may properly capitalize investments in the stock of another corporation where, and only where, the latter is the owner of operated railway property and the carriers' holdings are sufficient and essential to give it control of that corporation and it appears that such control will probably be permanent. * * *'

* * *

"Although the entire capital stock of the three companies named in the preceding paragraph was purchased and is now held by the C & O, the stock was acquired without our approval or authorization and without our having the opportunity to determine whether it was acquired for such consideration and upon such terms and conditions as were just and reasonable. Likewise, no opportunity was afforded us, as in the case cited above, to prescribe any conditions limiting the disposition of the stock in connection with its acquisition." (150 ICC at pp. 258, 259)

"The stock of the Ashland, the Long Fork, and the Millers Creek not having been acquired in accordance with the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act, the peculiar status of the C & O in relation to these companies and the stock and properties thereof is not such, in our opinion, as to justify the finding required by Section 20a of the Act as to the objects and purposes involved in

the issue of bonds of reimbursement of expenditures amounting to $6,246,646.67 made in respect to those companies and their properties for the purposes stated above." (150 ICC 257, 260)

The ICC has also continuously and consistently barred administrative relief under other sections than 20a to § 5(2) violators.

Despite the attempt of appellants to impute novelty to the District Court's action, the decision is fully documented with unchallenged citations from ICC administrative practice to the effect that unless exceptional circumstances are shown, §5(2) violators will be barred from administrative relief under or the benefit of the various sections of the statute. The following summary by the District Court of ICC policy is unchallenged by the ICC or any appellant herein:

> "The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.
>
> Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the Statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control and usually

compelled divestiture except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval was in good faith due to an oversight." (ICC Jurisdictional Statement, pp. 42-44).

No less than 28 ICC cases are cited in the court's opinion. (See footnotes 12 and 13). Appellants cite no contra authority, and indeed do not dispute the point.

The District Court made correct findings as to the impropriety of issuance of the new stocks in violation of § 20a(2) standards.

Last Term this Court affirmed (353 U. S. at 165) the ICC's finding that Alleghany had acquired *de facto* control of the New York Central Railroad System of 73 carriers (290 ICC 725; 295 ICC 11).[17] As of December 31, 1954 (the latest record date) that *de facto* control was evidenced by an investment of $14,700,000 at current market quotations in 577,200 shares of the capital stock of Central, representing "over ¼ of its (Alleghany's) total portfolio". (I. C. C. Jurisdictional Statement, pp. 37-38). Alleghany's annual report for 1956 shows that it has increased this investment to 973,500 shares of Central stock at a cost of $27,000,000 or roundly, $28 a share. (See N. Y. Times, Nov. 16, 1957, pp. 26, 32). Last month (November 1957) the stock broke to a new low price of $15⅛, representing a book loss to Alleghany of roundly $12,000,000 on its present Central shareholdings and is currently (December 6, 1957) selling at $15¼.[18] Under Alleghany's application, as approved by the ICC, the issuance of some 6,200,000 shares of New Alleghany Common Stock and 1,364,000 shares of New Preferred Stock is authorized. The New Common Stock would be issued upon conversion of the New Preferred Stock, and the New Preferred is to be issued pursuant to an

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[17] A list of the 73 carriers is appended to 290 I. C. C. 725, at 748-749.

[18] N. Y. Times, December 7, 1957, p. 34.

Exchange Offer, dated February 10, 1955 (R. 331-365) for the Old (Non-Convertible) Preferred. Thus, a substantial part of the two new stocks' equity would be based on the Central investment and would represent a capitalization of the illegally acquired Central investment. Obviously, the conversion rights to the New Common Stock that are given the New Preferred and the New Common Stock shares received upon conversion would rise and fall in substantial part depending on the rise and fall of the Central stock. It would be impossible for the wisest public investors accurately to appraise the new stocks while the illegality existed and the administrative remedy therefor was undecided. As Division 4 found:

> "The conversion rights of the 6% Preferred Stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock" (R. 530).

Thus an investor buying the New Stock because he desires to participate in the long-term capital gain potential of the common stock, based on the massive Central investment, would be deprived of that element of value if divestiture is ordered.

Conversely, an investor might be prompted to sell the New Stock in the belief that the New York Central investment was permanent and that its capital loss potential did not justify an optimistic appraisal of the conversion rights. Or if an investor knew the asset to be illegal, he might retain it in the expectation it would ultimately be divested and replaced with sounder investments that would make the capital-gain potential of the conversion rights more attractive. Unwary investors, in short, innocent of the illegal acquisition, would buy or sell the stocks and thus unwittingly act upon an investment based on illegal assets issued with the official authorization of an agency of the Government of the United States. Plainly, Congress never intended that § 20a should be used for such an improper purpose.

Under § 20a(2) of the Interstate Commerce Act the ICC may authorize issuance of new securities

> "only if * * * for some lawful object * * * compatible with the public interest * * * and * * * reasonably necessary and appropriate for such purpose" (49 U. S. C. 20a(2)).[19]

To the extent that the two new stocks capitalize the illegal assets, their issuance is not "for some lawful object"; insofar as the two new stocks expose future public investors to the risks inherent in the illegal assets, their issuance is obviously not "compatible with the public interest"; and in view of the fact that the huge funds ($27,000,000) diverted to purchase the illegally acquired assets would more than pay off the $18,000,000 of dividend arrearages on the old stock whose accrual and alleged unpayability are the only grounds for the new stocks' issuance (R. 528-530), their issuance could not be "reasonably necessary and appropriate" in the circumstances.

The District Court made findings in this respect that are left unchallenged in appellants' jurisdictional statements:

> "As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions. The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made, authorization of continued control should logically be determined before the stock-

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[19] The last sentence of § 20a(2) reads in full:

"The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

holders act upon the preferred exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commission's duty under section 20(a) is for the protection of investors as well as persons dependent upon transportation" (I. C. C. Jurisdictional Statement, pp. 38-39).[20]

In this connection the District Court called attention to the legislative history of § 20(a):

> "While the dominant purpose of § 20(a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was 'to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing' (Sharfman, the Interstate Commerce Commission, Vol. 1, pp. 189, 190).[21]
>
> "Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining con-

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[20] Despite these findings of the District Court, followed by findings extending over three printed pages reciting § 20(a)'s legislative history (ICC Jurisdictional Statement, pp. 39-41; fn. 11), and the court's specific citation in support of its ruling of *Bonds of Chesapeake & O. Ry. Co., supra*, (Id., p. 44), which as above noted held that a violation of § 5(2) made it impossible "to justify the findings required by § 20a" (150 ICC at 260), the ICC blandly states: "In its opinion, the District Court found that the Commission's order *satisfied* the provisions of Section 20a." (ICC Jurisdictional Statement, p. 8, emphasis supplied). The ICC builds almost its entire statement on this palpably untrue foundation.

[21] Appellees interpolate in this connection that, as previously noted, Alleghany has already suffered a book loss of $12,000,000 on its Central investment. Appellants in effect propose that this loss be absorbed by Alleghany's innocent stockholders rather than the persons who caused it to make this illegal investment.

fidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong. 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190-191 (1931)." (ICC Jurisdictional Statement, p. 39, fn. 11)

In construing § 20a this Court has stressed the Congressional concern for "the soundness" and "quality" of the "aggregate capitalization."

In *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448, at 474, this Court stated that the ICC under § 20a must pass upon "the soundness of the aggregate capitalization" and "the quality of the securities to be issued". How "sound" and of what "quality" are securities based on illegal assets?

The *Rutland Railroad* case stresses that "20a is directed primarily to safeguarding the 'public interest' " (143 F. 2d at 185), and includes "the safeguarding of future investors in the new securities" (fn. 17). In *Seaboard Air Line Ry. Co. Receivership*, 261 ICC 689 at 723, the ICC delineated § 20a as including the duty to determine that "the terms of the securities are in conformity with modern and sound financial practices." There is nothing new in these standards. As early as *Consolidation and Combinations of Carriers*, 12 ICC 277, 306, the ICC stressed that "It is of the utmost importance, also, that railway securities should be safe and conservative investments for the public."

§ 20a must, of course, be construed against the declaration by Congress of National Transportation Policy in the preamble to the Interstate Commerce Act. That declaration requires that the Act be "so administered as to • • • foster sound economic conditions." The preamble to § 20b, the voluntary recapitalization section, further elucidates the policy by requiring that it be administered so as "to promote the public interest in increased *stability* of values of railroad securities with resulting greater confidence therein of investors."

Clearly under the above standards and precedents, the District Court had no choice other than to set aside the § 20a order.

C. THERE IS NO SUBSTANCE TO APPELLANTS' CONTENTION THAT THIS COURT EXCLUDED FROM THE DISTRICT COURT'S DUTIES UNDER THE REMAND THE DETERMINATION OF THE § 5(2) QUESTION INSOFAR AS IT WAS RELEVANT TO THE ISSUES UNDER § 20a.

This Court in 353 U. S. 151 affirmed the ICC's order dated May 24, 1955 assuming jurisdiction over Alleghany Corporation pursuant to an application under § 5(3), in Finance Docket No. 18656, and then remanded the case to the District Court in the following words:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, *not previously discussed*, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act" (353 U. S. at 175, emphasis supplied).

Thus, the District Court was required to find whether the ICC's order of June 22, 1955, in another docket (No. 18866) approving an application under § 20a(2) and authorizing Alleghany to issue the new 6% Convertible Preferred Stock and the New Common Stock met the requirements of the following statutory standards:

> "Sec. 20a(2)
>
> "* * * The Commission shall make such order *only if* it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose" (49 U. S. C. § 20a(2)).

The District Court held, as set forth above, that the ICC could not find as a matter of law that the two new security

issues met these § 20a standards, since they would be issued against $14,700,000 of illegally-held assets.[22] No § 20a(2) claim was "previously discussed" in this Court's opinion, the 20a issue was not even briefed by any party on the first appeal. Neither in fact nor in law was it then decided; and it is obvious that determination of the issue requires different findings of fact and law than did the decision of the § 5(3) question. Affirmance of the § 5(3) jurisdictional order merely required, as this Court held, that Alleghany was in de facto control of one carrier (Central) and had acquired control of a second carrier (the Bridge Company).

Appellants contend, however, that when this Court affirmed the ICC's status or jurisdiction-assuming order of May 24, 1955 under § 5(3), based on an application to merge the Jeffersonville Bridge Co. into the Big Four Railroad, it implicitly (not explicitly) resolved against appellees their present claim in opposition to an entirely different application resulting in an entirely different ICC order under an entirely different section as now decided by the District Court. Appellants deduce this from the fact that in affirming the status order of May 24, 1955 under § 5(3), this Court held that there was no "need" to determine whether there was a violation of § 5(2) by Alleghany and "we • • • intimate no opinion on it, *since a violation should not deprive the Commission of jurisdiction over the violator.*" (emphasis supplied).

Insofar as the § 20a(2) ruling is based upon the § 5(2)(a)(i) violation, there is clearly no violation of this

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[22] The District Court gave other grounds for its decision, which it is unnecessary to discuss if, as we have endeavored to show, the grounds briefed here are sufficient to sustain the result. With respect, however, to these other grounds, it should be noted that the court fully cited ICC administrative precedents showing the impropriety of according a § 5(2) violator any relief or benefit under the Act. (See cases in footnotes, 12 and 13 of its opinion, ICC Jurisdictional Statement, pp. 42-45). In the § 5(3) case Alleghany was permitted to acquire the Bridge Company solely for the purpose of imposing ICC jurisdiction. None of the cases cited by the District Court are § 5(3) cases. Appellants' failure to comment on these cases is noteworthy.

Court's mandate. By their application for summary reversal appellants are seeking to deprive appellees of their day in this Court and in the lower Court on this claim by their contention that the District Court disobeyed this Court's mandate. In holding there was no "need" to adjudicate violation in affirming ICC "jurisdiction" this Court said: "To punish a violator by depriving the Commission of *jurisdiction* over it would be indeed quixotic". (353 U. S. at 162). The present appeals, like the decision below, concede the jurisdiction of the ICC to determine the § 20a issue.[23] (ICC Jurisdictional Statement, pp. 46-47). This Court did not hold, as appellants argue, that there was no "need" to adjudicate a § 5(2) violation in the § 20a stock issue proceeding, or that that question not being relevant in the § 5(3) jurisdictional proceeding was also irrelevant in the § 20a proceeding. Clearly, we think, this Court would not hold that two different statutes requiring the application of different standards and the making of different findings of fact and law, would be governed by an opinion leaving undecided, because unnecessary to decision in the first case, a decision statutorily made necessary in the second.

To extend, as appellants would, this Court's opinion upholding the ICC's jurisdiction under § 5(3) over Alleghany into a resolution of the § 20a(2) public interest and other standards is to resolve a question left specifically unresolved by this Court. Thus, in its majority opinion, the Court stated (353 U. S. at 161-162):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more car-

[23] The ICC makes it seem that the issue is one of "the Commission's power or jurisdiction to consider and act upon Alleghany's application under § 20a". (ICC Jurisdictional Statement, p. 12). This is not correct; the issue is the failure of Alleghany to comply in fact and law with the standards of § 20a.

riers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'

"The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control'. There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

Here, instead of the Commission being "deprived" of jurisdiction, its jurisdiction is recognized and the reason to "read" in the word "approved" comes not only from long-established ICC precedents under § 20a(2), but the legislative history and statutory intention of Congress as cited by the District Court (See pp. 16-23, *supra*).[24] Those citations, it should be noted, are neither commented upon nor opposed by any authorities in appellants' jurisdictional statements.

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[24] Appellants seek to exclude from the ICC's available remedies the power to deny issuance of securities against illegally held assets. Were this Court to grant summary reversal its action could be construed as limiting the ICC's remedies despite this Court's specific holding that "Remedies against a violator are provided by § 5(7), (8), and (9) of the Act." (353 U. S. at 162)

II

If the Court accepts the present § 5(2) argument of appellants, fairness would require that last term's majority opinion of the Court be vacated, and the minority opinion adopted as the opinion of the Court.

Alleghany's Jurisdictional Statement (pp. 17-18) and the ICC's (p. 15) reassert the position on § 5(2) that they briefed last Term. They ignore that this Court's majority decision of last Term required a control application by Alleghany where two or more "carriers" in the Central system were involved. The Court held that New York Central Railroad Company was "one or more carriers" and the Bridge Company "another carrier", to quote the fifth clause of § 5(2)(a)(i), and that Alleghany was therefore required to make, as it did, a control application (353 U. S. at pp. 165-171). Appellants are herein contending that in the same sentence the same word "carrier" previously so construed at their urging to exclude the "system" argument from being applied to the fifth clause, should now be construed so as to mean "system", not "carrier", in the fourth clause. (See footnote 9, this brief, for the relevant statutory language.)

This Court's majority opinion rejected appellees' argument, sustained last Term by the Chief Justice and Justices Douglas and Black, that the fifth clause of § 5(2)(a)(i) was not applicable to Alleghany because all the carriers were within one established system. The dissenting opinion stated:

> "To 'acquire control' (of a carrier) within the meaning of § 5(2) means then to put under common control carriers that previously were separate. We would strain to find a construction which would enable holding companies to run for shelter under the Act

> merely because, within the system they control, there have been corporate rearrangements or readjustments that change the internal structure of the system." (353 U. S. at p. 178)

The majority opinion having rejected this argument and appellants having accepted the benefits of the majority ruling, appellants are now estopped to contend that the same word "carrier" means "system" in the fourth clause, and does not mean "system" in the fifth. If appellants are now correct they have undermined the basis upon which last Term's decision was made in their favor; if they accepted that decision as correct, they must now accept the consequences of it. They can not have it both ways.

III*

Even assuming all of Alleghany's assets are lawfully held, there was a $20,600,000 *shortage* in assets for coverage of the quoted market values of Alleghany's securities at the time of the ICC's order.*

The record before the I. C. C. and in the District Court showed that, even if Alleghany's investment of $14,700,000 in 577,200 shares of New York Central stock as of December 31, 1954, is included as lawfully held, and all its other assets are included there still remained a *shortage* of $20,600,000 in capital assets to support the market prices of Alleghany's equity securities (its Prior Preferred, Preferred and Common stocks, and outstanding option warrants) on June 22, 1955, the date of the I. C. C.'s final

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* If this point of appellees is correct, it would be sufficient to sustain the result below, thus dispensing with the need for a determination of the previous questions.

order herein.[25] On May 22, 1955, the day preceding the order of Division 4 herein, the shortage amounted to roundly $17,400,000. While the District Court did not discuss this question, appellees brief it here solely to show the propriety of the result and as an independent ground for affirmance assuming appellants are correct in their assertion that the New York Central investment is lawful.

The undisclosed risks to public investors created by Alleghany's financing.

On May 25, 1955, the date preceding the order of Division 4 herein, the net assets of Alleghany applicable to its equity securities (its prior preferred, preferred and common stocks, and outstanding option warrants) totalled roundly $75,000,000.[26] On June 22, 1955, the date of the ICC's final order, the total was roundly $85,000,000.[27] By comparison the market prices on these equity securities totalled an aggregate of roundly $92,400,000 on May 25, 1955, and roundly $105,600,000 on June 22, 1955, indicating that at the time of the ICC preliminary and final orders herein there were shortages of assets to support some $17,400,000 to $20,600,000 in publicly quoted market values for Alleghany's securities.[28] It was apparent, therefore,

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[25] Unprinted record, affidavit of Randolph Phillips, affirmed June 14, 1957, par. no. 21. The record before the ICC did not disclose the asset shortage existing at the time of its orders. The balance sheets of May 25, 1955 and June 22, 1955, which disclosed the shortages, were not made available to appellees until the SEC hearings, almost a year after the close of the ICC proceedings. Had the requested evidentiary hearing been granted by the ICC such facts as herein appear could have been called to its attention. Where parties before an administrative agency have no opportunity to raise the issue before it, review of the issue is not barred by the courts. (See Appendix A to this brief, at p. A-3). Appellees' calculations were uncontroverted in the District Court.

[26] Id., par. no. 21.

[27] Id., par. no. 21.

[28] Id., par. no. 21.

from the financial structure being created by these orders that a speculative frenzy was being promoted with potentially deceptive securities. The holders of these securities, being uninformed of the actual net asset values then existing, were unaware of the risks involved. Since these securities were not closely held but far-flung throughout the securities markets, a question of public interest, necessity and propriety was thereby raised. It was incumbent upon the ICC first to ascertain the above pertinent facts and then to cast its order in a manner consistent with the public interest questions involved in accordance with § 20a standards.

In *Commercial Motor Freight, Inc.*, Finance Docket No. 18117, the ICC noted that "as of the date of the balance sheet, the applicant's capitalizable assets, determined according to the principles set forth in *Chesapeake & Ohio Railway Co. Stock*, 254 ICC 653, 669, and the cases it cited therein, exceed its capitalization by an amount sufficient to support the proposed issue of stock" (10 Fed. Carrier Cases, 430, 432). By contrast here, it is obvious that Alleghany's capitalizable assets applicable to its outstanding equity securities judged by the most significant test, that of market value at the time of the orders herein, were vastly insufficient.[29] In *M. H. Clarke, etc., Keeshin Freight Lines,*

[29] In a company whose major assets are investments with quoted market values (R. 166), it is obvious that the market value test is more significant than any other. Were the investments physical properties other tests would be more significant, such as book value or reproduction costs or going-concern value. As of December 31, 1954, the date of the latest balance sheet prior to the order of Division 4, Alleghany's total assets were $88,950,000 based on current market quotations (R. 162), of which $67,944,000 were total investments at current market quotations, including $19,657,800 represented by the New York Central Investment (R. 166, 169, fn. 3) (ICC Jurisdictional Statement, p. 38, fn. 8). While Division 4 referred to the market value of the assets as of November 30, 1954, as well as to their cost (R. 530-532), it failed to consider the adequacy of these assets to support the prevailing market prices.

et al., 10 Fed. Carrier Cases, 363, the ICC approved an overcapitalization because the stock was closely held and the holders were aware of the risks involved. By contrast here, there were some 1,186 holders of the old preferred stock as of February 10, 1955, the date of the Exchange Offer (R. 356), not to mention the 16,499 common stockholders of Alleghany as of August 24, 1954 (R. 220). In addition the stocks of Alleghany are listed on the New York Stock Exchange and widely traded in by the public, instead of being closely held, and there is no way to insure that any of the present holders, not to mention the new ones daily entering the securities market, are or will be aware of the risks involved.

Neither Alleghany, the ICC, nor any other appellant denied the facts of the capital asset shortage before the District Court. Alleghany, however, asserted that the ICC "computes capitalization on the basis of the par value of a corporation's outstanding securities, not market prices" (Alleghany District Court br., A 31). Such a test is obviously inappropriate where the par value has been written down, as in Alleghany's case, to nominal amounts for the common stock because of tax considerations, and where huge amounts of option warrants are outstanding which have no par value. Alleghany relied on *Chesapeake & Ohio R. Co. Stock*, 254 ICC 653, which disclosed that "applicant's common stock was selling at $47⅝, *approximately the same as the book value* • • • or nearly double the par value" (pp. 657-658). Thus it is clear under the very authority cited by Alleghany that the ICC uses book value in relation to market price to test the adequacy or soundness of the existing and proposed capital structure.[30] The rule is too obvious to be debatable; either there were adequate assets, based on book or market value, to support the struc-

[30] Book value was an appropriate test in the *Chesapeake & Ohio* case because the assets were mainly physical properties. See fn. 29.

ture or there were not. If there are not, the unsoundness of the structure is obvious, and it is plainly contrary to the public interest to facilitate the unloading upon the public markets of equity securities when there exists a shortage of assets to support the market prices at which the outstanding equity securities are selling. Here the extreme danger to which the ICC would expose the public is indicated by the huge amount of the capital insufficiency, namely some $17,400,000 to $20,600,000, at the time of its order, and the subsequent market collapse in Alleghany and New York Central securities. It is apparent that this collapse would have been less extreme had the ICC withheld authorization of the new and obviously inflated capital structure.

The ICC's duties under § 20a require it to find that "the terms of the securities are in conformity with *modern* and *sound* financial practices." *Seaboard Air Lines Ry. Co. Receivership*, 261 ICC 689, 723. Or, as the courts have stated, "20a is directed primarily to safeguarding the 'public interest' " and to "the safeguarding of future investors in the new securities" (*Rutland* case, 143 F. 2d 179, 185, 186 fn. 17).

The Collapse of Alleghany Security Prices Since the ICC Order Confirms the Impropriety of its Section 20a Findings and the Accuracy of the SEC's Warning that Issuance of the New Stock was not "Appropriate in the Public Interest."[31]

When the ICC issued its order herein on June 23, 1955, Alleghany common was selling at 10¾ compared to 4⅝ as of December 9, 1957 and the New Preferred stock on a when-issued basis sold at $34⅜ compared to recent bids of approximately $260. The lower quotes reflect declines of some $26,000,000 on the 4,600,000 shares of common outstanding and of some $11,000,000 on the 1,360,000 shares

[31] The SEC's findings are only of comparative interest, since this Court has in effect found it not to have had jurisdiction at the time it made them.

of New Preferred. Underlying these losses is the fact that Alleghany's holdings of roundly 1,000,000 shares of New York Central collapsed from a price of $44 per share on June 23, 1955 to $15⅛ as of December 9, 1957, representing a decline for the investment of some $29,000,000.[32]

These losses demonstrate pragmatically that the ICC in authorizing the issuance of the two new stocks has approved securities that are neither "appropriate", "sound", nor have "stability" within the meaning of § 26a and the declared policy of the Act. *In the Matter of Alleghany Corporation*, Investment Co. Act Release No. 2446, dated November 30, 1956, the SEC noted that the New Preferred stock's right to purchase was "potentially deceptive"; that such securities are "a speculative medium that introduce complicating and undesirable features into a corporate structure * * * confuse investors" and are not "necessary or appropriate in the public interest or consistent with the protection of investors."[33] These expert warnings have now been confirmed by the 66⅔% collapse of Alleghany's securities in the recent market decline, a decline far greater in degree than that for the market as a whole. The present appeals represent a continuation of attempts by the Preferred Stock appellants to consummate the unloading of their stock on innocent public "when-issued" buyers at the 1955 high prices despite the recent collapse in values. The public reports of the SEC disclose that on June 26, 1955, Robert R. Young, Chairman of Alleghany, started to unload his holdings by selling 1,500 shares of the New Preferred stock.[34] This occurred after he had doubled

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[32] For 1955 prices, see Brief for Appellees, No. 36, October Term, 1956, at p. 109; the current quotations in The New York Times for December 10, 1957, except that the "when-issued" quotations on the New Preferred are taken from quotations published by the National Quotation Bureau.

[33] Its now prophetic decision is set forth in full in the amicus brief for SEC, No. 36, October Term, 1956, as an appendix thereto.

[34] See Official Sale of Security Transactions and Holdings, Vol. 21, No. 7, July, 1955, p. 1, and Form 4 Report to the SEC for the month ending June 30, 1955 by Robert R. Young.

his Old Preferred holdings and at the low prices prevailing in 1954 prior to announcement of the Plan. *Breswick* v. *Briggs*, 135 F. Supp. 397, 402-403.[35] His divestment program was halted only by the District Court injunction.

Similarly the Preferred Stockholder appellants Gruss & Co. are "when-issued" sellers (R. 75, 77) acting on behalf of themselves and other "when-issued" sellers of some 100,000 New Preferred shares at the 1953 prices (R. 77). If the final judgment below is reversed these sales contracts will be completed and the buyers forced to take securities that have since collapsed in price.

In its Jurisdictional Statement the ICC makes an indirect admission of the inequitableness of the appeals herein in speaking of the need for prompt consummation of the issuance and sale of the New Preferred stock "by permitting it to be carried out before it is made impractical by changing market conditions * * * before it is rendered irrelevant by changing business and market conditions." (pp. 21-22). That those changes have actually occurred since it issued its 1955 order may not be denied. Yet it still presses to consummate a plan that plainly has been "made impractical" and "rendered irrelevant" within the meaning of the "public interest" and the "reasonably necessary and appropriate" standards of § 20a.

CONCLUSION

The motion to affirm should be granted.

Respectfully submitted,

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Attorney for Appellants BRESWICK & CO. and MYRON NEISLOSS

RANDOLPH PHILLIPS, Appellant *Pro Se.*

December 10, 1957.

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[35] For details, see Brief for Appellees No. 36, October Term, 1956, pp. 106-107.

APPENDIX A

Chronology of ICC Proceedings

On September 20, 1954, Alleghany and New York Central filed an application with the ICC under Section 5(2)(a)(i) of the Interstate Commerce Act for the alleged purpose of seeking ICC approval of a merger between a Central subsidiary (the Cleveland, Cincinnati, Chicago and St. Paul Railway Co., colloquially known as the "Big Four") and the Big Four's wholly-owned and wholly-controlled subsidiary, the Louisville & Jeffersonville Bridge Company (R. 210).

On January 11, 1955 Lewis D. Gilbert filed in the § 5(3) jurisdictional proceeding a petition to deny Alleghany's application for violation of § 5(2). (R. 269, 277-279). Alleghany's application under § 20a was filed on February 18, 1955 (R. 371). On February 4, 1955, appellee Breswick & Co. joined in the Gilbert motion (R. 317, 318). On March 2, 1955, Division 4 ruled in the § 5(3) proceeding that Alleghany had acquired control of the New York Central System in violation of § 5(2) but it nevertheless issued the § 5(3) order (R. 425-426). The Division also denied appellee Breswick & Co.'s petition to intervene (R. 416). On March 21, 1955, appellee and others filed an application for rehearing, urging the full ICC to reverse "on the basis of absence of statutory power and violation of the Investment Company and Interstate Commerce Act" (R. 448-449), the latter being an obvious reference to the § 5(2) violation found by Division 4. On April 11, 1955, in a joint amended petition in both the 5(3) and 20a proceedings; appellees Breswick and Phillips renewed their previous objections (R. 489, 491-492).

It was not until May 24, 1955 that the full ICC overruled the § 5(2) finding of Division 4 in the § 5(3) proceeding. Until then Division 4 had held up its § 20a report and order. It did not issue either until May 26, 1955 (R. 518, 536) when

it had become bound (as were appellees at the ICC level) by the prior overruling of the full Commission, and thus gave no consideration to the effect of the § 5(2) violation on the § 20a application.[1]

Appellees' first pleading in the § 20a docket was made on March 28, 1955 (R. 478), while Division 4's ruling of March 2, 1955 was still the law of the case, and at that time appellees were entitled to rely on that fact. In that pleading they expressly alleged in *haec verba* a violation of the § 20a "lawful object", "public interest" and "necessary" standards (R. 478-479). Since the ICC overruled Division 4 by its report and order of May 24, 1955, the point was disposed of at the ICC level for all purposes including the § 20a proceeding[2]. Obviously, appellees then had no further remedy than to resort to the courts. The doctrine of estoppel for failure to raise an issue at the administrative level has never been applied to persons denied an evidentiary hearing and the right to submit briefs as were appellees, nor to a case where the agency itself, or a division, raised the issue. The cases cited by the ICC thus are inapplicable, even assuming appellees had not raised the issues of violation of § 5(2) and 20a. Since appellees in fact raised both issues, their standing to review them may not be fairly denied.

The ICC's jurisdictional statement misstates the facts and the law to make it appear that the District Court decided "*sua sponte* issues which were barred to the plaintiff-appellees." (ICC Jurisdictional Statement, p. 17). The question decided in favor of appellees which is the basis of this motion to affirm is, that it is unlawful under § 20a to

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[1] The full ICC also never considered the effect of the § 5(2) violation on the § 20a application. When it issued the § 20a order it was on the incorrect assumption, previously contested by appellees, that it was correct in overruling Division 4's finding that § 5(2) had been violated.

[2] Appellees first learned that they had been admitted to the § 20a proceedings on May 27, 1955 when they were served with notice to that effect (R. 539-540).

approve issuance of New Common and New Preferred stocks based on $14,700,000 of assets acquired in violation of §5(2).

The cases relied upon by the ICC bar an appeal of issues not raised before the administrative agency "unless there is reasonable ground for failure so to do" (*F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498-501), because "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." (*U. S.* v. *Tucker Truck Lines*, 344 U. S. 33, 36-37). Applying these criteria, the above facts demonstrate appellees' right to raise these issues on this appeal.

Appellees' standing to sue and review the §20a orders of the ICC has already been specifically upheld by this Court in its prior opinion (*Alleghany Corp. et al.* v. *Breswick & Co. et al.*, 353 U. S. at 159):

> "Alleghany urges initially that the Commission's orders dealing with its status under the Interstate Commerce Act and dealing with its new preferred stock were not reviewable at the suit of appellees, that appellees had no standing. We find that appellees do have standing to challenge these orders. . . . The appellees are common stockholders of Alleghany. The new preferred stock issue approved by the Commission is convertible, and under relevant notions of standing, the threatened 'dilution' of the equity of the common stockholders provided sufficient financial interest to give them standing."

The Court remanded the cause to the District Court, stating:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

The District Court thereupon determined the remanded question in favor of appellees, and voided the ICC orders.[3] Its opinion is set forth at pp. 25-47, and its final judgment at pp. 48-51 of the ICC's jurisdictional statement.

APPENDIX B

The Events After Close of the ICC Record

When appellees herein sought to object to the ICC assuming jurisdiction over Alleghany and approving issuance of the new preferred stock, they were denied a hearing and their objections were summarily overruled. Thereafter they instituted on June 6, 1955 this three-judge court action (R. 32), and while their motion made on June 15, 1955 for preliminary injunction against the jurisdiction-assuming order was *sub judice* (R. 53), Robert R. Young, chairman, and Allan P. Kirby, President, having previously acquired 20% of the old preferred stock caused Alleghany on June 23, 1955 to start issuing the new preferred stock. By this act they hoped to confront the court with the introduction into the stream of commerce of $48,000,000 of unrecallable securities as a *fait accompli*, and thus to make it impossible effectively to give any relief to the appellees and to the Alleghany common stockholders as a class (R. 37, 613, 640-641).

The order to show cause why the motion for preliminary injunction should not be granted was returnable on June 23, 1955. By stipulation of the attorneys for the U. S., the

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[3] The ICC states that the District Court "lacked power to raise and determine *sua sponte* issues barred to the plaintiff-appellees." There is no such raising or determination here. Appellees alleged before the ICC that § 20a would be violated and, taking cognizance of this Court's subsequent ruling on the § 5(2) issue in 353 U. S. at 161-162, expressly argued in the District Court the theory on which it decided the case. (Plaintiffs' Memorandum dated June 24, 1957, p. 7; and Reply Memorandum, dated August 29, 1957, pp. 61-62, citing *St. Louis-San Francisco Ry. Co. Bonds*, 150 ICC 139, 141.)

ICC and the plaintiffs, orally made in open court on June 21, 1955, the motion was adjourned to June 30, 1955 with the approval of the court per Dimock, D. J. (R. 95-96). At no time did the ICC reveal to the Court that on the very next day following its appearance in support of the government's requested stipulation for adjournment, it would issue a final order approving issuance of the Preferred Stock and denying the request of appellees for a stay of such an order until they could make application to the three-judge court for a restraining order. The record also shows that the final order of June 22 of the ICC was not publicly filed by the ICC until June 23 and that service and notification of its issuance was made on plaintiffs by mail dated June 23, 1955, and received in New York on June 25, 1955. The foregoing facts were alleged in paragraphs 6 and 7 of plaintiffs' supplemental complaint R. 95-6) and were admitted in the answers of both the United States and the ICC (R. 121, 135).

Had not the District Court frustrated this maneuver by its restraining order and injunctions, Young and Kirby and the other preferred stockholders would have received securities with a then current market value of $15,000,000 in *excess* of 100% of their maximum claims as holders of the old preferred stock, and the preferred stock could then have passed into the hands of innocent third parties.

The ICC questions whether the District Court "was precluded from considering" the issues upon which it decided for appellees "by the provisions of paragraph (11) of §20a" (p. 3).[4] The securities which may not be voided

[4] Section 20a(11) provides:

> "• • • any security • • • for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued • • • without such authorization therefor having been first obtained, or if issued • • • contrary to any term or condition of such order of authorization • • •; but no security issued • • • shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization." [49 USC 20a(11)]

under § 20a(11), assuming a rescission is a voiding,[5] are only those that would be "rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order * * *." This, we submit, refers to a "failure" by the issuer and not to a failure by the ICC to make a valid order.[6]

At the present stage of this case review is limited to the ICC record and does not include events after that record was closed. Presumably in recognition of this fact, the District Court refused to grant or at least deferred action on appellees' motion for a mandatory injunction to restore the *status quo ante*. Alleghany's delivery of 900,000 shares of the new preferred stock to the now frozen old preferred stockholders, and to return their old stock to the holders of deposit receipts for the remaining 400,000-odd shares.[7] It is well established that compliance with an administrative order does not limit its review (*Chicago Junction* case, 264 U. S. 258, 269-270; *South Carolina Public Service Authority* v. *S. E. C.*, 170 F. 2d 948, 952).

Finally, it is the Urgent Deficiencies Act, not § 20a(11), which determines the scope of review. Pursuant to that Act, this Court voided part of a § 20a order in *U. S.* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311.

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[5] See fn. 7, *infra*.

[6] Failure to make the requisite findings in the order itself pursuant to § 20a(2) standards obviously would not be exculpated and neither the ICC nor Alleghany so contend.

[7] (Unprinted record, plaintiffs' motion dated June 14, 1957, and plaintiffs' rejected order on settlement of final judgment). For details of Alleghany's attempt to present this Court and the lower court with a *fait accompli* by disrupting the *status quo*, see Brief for Appellees, No. 36, October Term, 1956, at pp. 15-16, 19-20, 127-129.